LIOW SU FAH

v.

CHUNG MUI FATT

HIGH COURT, SINGAPORE
AP RAJAH J
[SUIT NO. 2996 OF 1978]
8 APRIL 1985

CONTRACT: *Money paid to defendant - Whether as loan or agency payment.*

The plaintiffs claim was for the repayment of RM360,000 which he alleged he lent to the defendant free of interest, to enable the latter to make payment in respect of shares in a company formed for the purpose of developing a piece of land in Ipoh. The defendant, on the other hand, claimed that he had received the sum as an agent, that the sum paid to him was a sum due from the plaintiff to the defendant's principals who were partners of the plaintiff in one of the his projects.

Held:
The plaintiff's claim must be dismissed. The evidence of the plaintiff was highly improbable in the circumstances of the case.

[Plaintiff's claim dismissed.]

For the plaintiff - Augustine Soh
For the defendant - Ronnie Quek

JUDGMENT

AP Rajah J:

The plaintiff's claim is for the repayment of the sum of Malaysian Dollars RM360,000 lent by him to the defendant free of interest, the loan being made by plaintiff's cheque, dated 19 February 1974, in favour of the defendant (Date of issue of Writ 29 September 1978) alleged by him to enable the defendant to make payment on time in respect of an allocation of shares in a Malaysian company namely Yeng Hing Enterprise Sendirian Berhad (Yeng Hing) formed in August 1973 for the specific purpose of buying and developing a piece of land in Ipoh. Yeng Hing had bought land at Ipoh for about RM 11,500,000.00 in August 1973 and had made a first payment of about RM1.3 million and the balance of the purchase price had to be paid on or before 19 February 1974.

The plaintiff and the defendant have known each other in Sabah since their childhood. The defendant had been his neighbour and they had attended the same secondary school in Sandakan, Sabah. In 1957 they parted, the plaintiff going to Hong Kong for further studies and the defendant to Australia on a Colombo Plan Scholarship. After his studies the plaintiff returned to Sabah in 1961. As for the defendant he obtained in 1962 an Honours Degree in Physics at the University of New South Wales. From 1963 to 1968 he was a teaching fellow at the same University. In 1968 he went to the United States of America to join Brown University as a Research Associate. At the end of 1969 he went to Oakridge National University Research Center under the Atomic Energy Commission. He came to Singapore in 1971 and joined the teaching staff of the University of Singapore, now known as the National University of Singapore.

In the meantime the plaintiff after his return to Sabah in 1961 had started to make a career for himself as a housing developer. In 1968 he started a family partnership firm under the style of name of Fu Yen Development Company of Sabah (Fu Yen), the partners of which were:

1. the plaintiff
2. Liow Su Khen (his younger sister)
3. Liow Su Cheong (another sister)
4. Lee Fook Tai (his mother)
5. Chin Shin Lan (his wife's sister), and
6. Chin Yit Yee (his wife's brother).

According to the plaintiff's evidence (p. 11 of the Notes of Evidence) (Notes):

> Fu Yen Company, a partnership firm, has undertaken more than three separate projects since the time of its formation in 1968. Each project had a separate set of partners. Some projects proceeded simultaneously. Each project had its own set of accounts. Each project determines the profits or losses of that project. And there is no carrying forward into any of the other projects.

The first development project of Fu Yen known as Project No 1 was started sometime in 1969 and completed sometime towards the end of 1970. No one else was interested in the first project except for the six members of the family set out above.

In his cross-examination the plaintiff deposes as follows:

> The second project was in 1969. (Project No 2 was actually started in February 1970 (p. 14 of Notes) and not in 1969.) The profits of Project No 1 were not paid out to the members of the family but were retained by Fu Yen Development Company. RM 150,000 was retained in the firm and this was put to the use of the second project. The three sums of RM 20,000 were paid to Nicholas Fung. The RM 150,000 was not paid to Nicholas Fung. The RM 60,000 and the RM 150,000 were used for the benefit of the project" (pp. 7 and 8 of Notes).

It is common ground that Nicholas Fung was the solicitor to Fu Yen and that he was responsible for the management of the finances of Fu Yen and that the plaintiff was in charge of the outdoor and building works on the various projects. The partners in Project 2 were Chung Thiam Fatt, Chung Ka Fatt, Hiew Mau and the plaintiff and the three sums of RM 20,000 each paid to Nicholas Fung refers to three payments of RM 20,000 each made by Chung Thiam Fatt, Chung Ka Fatt and Hiew Mau as capital contributions to Project No 2. The evidence on behalf of the defendant is that the capital contribution to Project No 2 was RM 70,000 as stated in DAB22 whereas the evidence of the plaintiff is that the capital contributions to Project No 3 was the aforesaid RM 60,000 contributions plus the RM 150,000 profits on Project No 1 put to use in Project No 2. It will be noted that Nicholas Fung, the one in charge of the finances of the various projects does not support the plaintiff on this aspect of the case. According to the Statement of Income and Expenditure Project No 2 prepared by Nicholas Fung (DAB22) the paid up capital on Project 2 was RM 70,000. The three contributors to this project say that they were not aware as to who it was who contributed the other RM 10,000 to Project No 2. Their surmise is that it might have been the Plaintiff. It is to be noted that there is no entry of this sum of RM 150,000 in the Account. According to DAB22 the net profit on Project No 2 was RM 259,441.90 and the paid up capital together with the net profit was RM 329,441.90, which was the sum available for payment to the four partners of Project No 2. It will also be noted that DAB22 sets out under "Miscellaneous Expenses" the cost of the land for Project No 2 as being RM 70,000

for Deposit for land plus RM 14,845.10 being balance of land purchase price. It would appear from the same document that under Project No 2 advances up to the extent of RM 290,000 were made to the plaintiff, Chin Nguk Fatt and Lee Vui Min. It would therefore seem that such advances not only swallowed up the net profit of RM 259,441.90 but also did eat into the paid up capital of RM 70,000. Of the RM 290,000 so advanced the plaintiff himself received RM 250,000.

According to the plaintiff the profit on Project No 2 was RM 251,000 (p. 8 of Notes). If this sum is inclusive of RM60,000 capital contributions and the said $150,000 carried over from Project No 1 into Project No 2 then the net profit on Project No 2 would be only $41,000. It is also common ground that none of the profits or capital invested in Project No 2 was paid out to the partners of Project No 2.

It is against this background that the defence of defendant should be viewed.

The defendant denies that he borrowed the money from the plaintiff. He however does not deny that he received the money on 19 February 1974 but contends that he received it as agent of his two brothers Chung Thiam Fatt, Chung Ka Fatt, and Hiew Mau. He avers that:

> The sum of RM360,000 paid by the plaintiff on 19 February 1974 was a sum due from the plaintiff to the defendant's principals Chung Thiam Fatt, Chung Ka Fatt and Hiew Mau in respect of claims made by them against the Plaintiff arising out of the Plaintiff appropriating to himself and investing in West Malaysia profits from Project No 2 belonging to Fu Yen Development Co. (a firm) of Sabah in which firm the plaintiff, the said Chung Thiam Fatt, the said Chung Ka Fatt and the said Hiew Mau were partners.

And that:

> The plaintiff paid the said sum to the defendant in pursuance of instructions from his said partners and was at all times aware of the nature of the payment and knew that the defendant received the said sum as Agent for the said Chung Thiam Fatt, Chung Ka Fatt and Hiew Mau.

The case for the plaintiff was deposed to by him as follows:

> The shareholders in Yeng Hing Enterprise Sendirian Berhad are listed in PAB2. The company was formed in August 1973. Purpose of this company was to purchase a piece of land in Ipoh. In my name I held one share, Sabah Penang Development Sendirian Berhad held one share. Sabah Penang Development Sendirian Berhad held 30% of the issued capital. I held 50% of the shares in Sabah Penang Development. Chung Brothers held 800,000 shares of RM 1 fully paid. The defendant is one of the brothers of the 'Chung Brothers'. The defendant is a partner in Chung Brothers. The Chung Brothers used my address at Penang for their business. PAB4, 5, 6 and 7 deals with the purchase of a piece of land in Perak for about RM 11,500,000 in August 1973. The first payment of about RM 1.3 million was made by Yeng Hing Enterprise and the balance was made on 19 February 1974 also by Yeng Hing Enterprise. (The paid up capital of Yeng Hing Enterprise was RM 8 million). Yeng Hing Enterprise borrowed from the First National City Bank RM 4 million (Malaysian). This piece of land was the security. A meeting was held on 19 February 1974 at Chung Siew Yin Building Room 207 Penang. Purpose was to pay up the share capital. Present at the meeting were the company's solicitor, Rajasingam, the defendant and Tan Kung Gyen. The majority of shareholders were present. The defendant was representing Chung Brothers at this meeting. Before this meeting RM 1.5 million had been paid by the shareholders in proportion to their shareholdings. Balance of RM 6.5 million was called up and this was for the purpose of paying for land. All the shareholders paid up the balance on their shares. I don't know who the partners in Chung Brothers were. The defendant claimed to represent them. The defendant paid for the Chung Brothers' allocation of shares in respect of the RM 1.5 million. The defendant personally borrowed RM 360,000 from me to effect the payment on the balance

due on the shares. He borrowed this sum on 19 February 1974. A day before the meeting the defendant told me that he feared that his money might not arrive in Penang in time. He asked for the loan on the day of the meeting i.e. 19 February 1974. At that time I was the Managing Director of Yeng Hing Enterprise. Everyone of the shareholders except for Chung Brothers paid their share by cheque on that day. It was I who introduced the Defendant to this Company. On 19 February 1974 I lent him this money with my personal cheque. (Cheque dated 19 February 1974 put in and marked P1. Acknowledgment put in and marked P2.) The vendor was paid off on 19 February 1974. The purchaser bought a bank draft in favour of the vendor and gave this to the Company's solicitor and they paid off the vendor this bank draft in favour of the vendor. PAB11 - Payee is the vendor. The sum of RM 360,000 forms part of the RM 7,771.104.25.

With regard to the lending of the RM360,000 the plaintiff has this to say:

This money is not my money. I got a loan from the Bank (First National) and lent it to him. It is this loan which has resulted in the Bank taking bankruptcy proceedings against me in 1976. I then borrowed from a Hong Kong friend and paid off the Bank. I paid the Bank at the rate of 12% per annum. I am still paying this. The only reason I can give is that of my friendship for the defendant. Because of this my Hong Kong friend seized my land in Sandakan." (p. 17 of Notes)

In support of his case Mr. Rajasingam, Solicitor practising in West Malaysia gave evidence.

As for the defendant, his case was that there was a meeting on 20 August 1973 in Penang between the plaintiff and the two Chung Brothers at which the defendant was present but not taking part and that at this meeting the plaintiff agreed to pay a negotiated sum of RM 360,000 for the investment and profits of the two Chung brothers and Hiew Mau in Project No 2.

In support of his case the defendant called his two Chung brothers and Hiew Mau who produced two documents DAB22 and DAB23 which if accepted would help advance his case. The plaintiff denied any such meeting ever having taken place and that the two documents were fabricated by the defence. Listening to the evidence of the defendant, the two Chung brothers and Hiew Mau and assessing it against the other evidence in the case, both oral and documentary, I did not get the impression that these two documents had been fabricated by the defence to bolster its case. I accept their evidence on this issue and find such a meeting was held on 20 August 1973 and that the two documents DAB22 and DAB23 were not fabricated after the issue of the Writ by the plaintiff. I also find that the two documents as alleged by the plaintiff came into existence on the days mentioned therein.

I reject the evidence of Rajasingam. I found his evidence unsatisfactory. The evidence of the plaintiff as to the interest-free loan of RM 360,000 I found highly improbable particularly against the background that on 19 February 1974 the plaintiff had not only not distributed the profits and capital invested by the two Chung brothers and Hiew Mau but had appropriated all the profits plus some of the capital of Project No 2. Even more improbable I find his evidence that he borrowed the said RM360,000 from the bank at 12% per annum and thereafter borrowing from a Hong Kong friend at 15% per annum to repay the bank and that he is still paying his Hong Kong friend this interest even after he had seized his land in Sandakan.

In these circumstances I do not see how I can give judgment for the plaintiff. His claim is dismissed with costs.

Also found at [1985] 1 CLJ 490